

Post-Roe Risk Mitigation Checklist

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The Dobbs decision has triggered widespread legal uncertainty concerning the delivery of reproductive and family planning services. About half of the U.S. states already prohibit or heavily limit abortion services or are expected to prohibit or limit abortion services in short order. These laws largely regulate healthcare providers and patients, although some state laws explicitly capture other parties that “aid and abet” the violation of these laws. Many of these state laws are criminal in nature, and other criminal aiding, abetting or conspiracy theories may also be relevant. However, state abortion laws are being challenged in state and federal courts on various legal grounds, the U.S. President signed an executive order on July 8, 2022, aimed at protecting abortion rights, and many states are following suit by passing legislation to protect patients who seek abortion services.

Any organization whose operations touch on reproductive health services in any way (e.g., healthcare delivery organizations, including fertility providers, investors, payors, insurance carriers, employers that provide such benefits) should immediately examine whether the organization is at risk of violating these state laws and the extent to which the organization can address or mitigate this risk. This requires examining the precise nature of the organization’s services and data, geographic footprint, corporate structure and organizational priorities.

RELEVANT CONSIDERATIONS FOR EXAMINING LEGAL COMPLIANCE AND RISK

- What specific services does the organization provide? Do any services involve family planning in any way (e.g., pregnancy termination, in vitro fertilization, manufacturing, marketing or distribution of prescription medications, counseling, or travel benefits)?
- Is the organization a business associate or does it otherwise support an organization that provides any family planning services?
- Does the organization invest in or advise any other organizations whose operations touch family planning services, or have a joint venture or other type of partnership?
- Does the organization provide staff or personnel to an organization that is involved in family planning?

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- Is the organization a health care provider or is the organization considering access assistance to patients or employees? [CLICK HERE TO SCHEDULE A MEETING TO DISCUSS YOUR ORGANIZATION'S NEEDS DM_US 189234615-4.PG0540.0010](#)
 - Is the organization a manufacturer or distributor of medications that may be used on or off-label for pregnancy termination or emergency contraception?

What are the organization's clinical and/or business priorities related to reproductive health services or workforce benefits?

- How do the recent changes in the law impact these priorities?
- Have the appropriate stakeholders been consulted? For example, has the organization's Board of Directors or the appropriate committee received an update and approved any necessary actions?

What is the organization's corporate structure?

- Does the organization serve as a management company to a friendly PC structure?
- Does the organization and/or a parent or subsidiaries that require risk mitigation?

Has the organization considered its connection to and operation in states with protective laws or proposed legislation (e.g., California, Connecticut, New York), and how these laws may apply to lessen potential risk?

Which of the organization's employees and contractors perform work that relates to family planning services or benefits? What do these individuals do for the organization? What are the job titles and how are the organization's services marketed?

What data is in the organization's possession that may be relevant to family planning services? For example, does the organization create, access or store medical records with information relevant to family planning? Where are the organization's sensitive records stored? What is included in these records? What employees and other personnel have access to these records

What relevant clinical and/or compliance policies and procedures may need to be put into place or modified?

What existing family planning, fertility, abortion, or health care travel-related benefits does your organization currently provide to your employees?

Taking into account your organization's culture/ethics, employee relations, and your public presence, as well as the shifting legal and compliance landscape, what type of family planning, fertility, abortion, or health care travel-related benefits make sense for your organization to provide post-Roe?

- How can your organization provide these benefits while mitigating potential risks?

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- How can your organization operationalize these benefits by leveraging existing benefit plans and/or existing vendor relationships?

How can your organization communicate any existing, continued, or additional family planning, fertility, abortion, or health care travel-related benefits to employees and the public while balancing opposing views and mitigating potential enforcement risks?

How can your organization continue to comply with the myriad healthcare benefits laws while minimizing additional compliance costs (e.g., ERISA, ACA, HIPAA, COBRA, MHPAEA)?

Does the organization understand any relevant professional licensure-related, civil, or criminal penalties that may be implicated by the organization or its members, employees, or contractors providing services/benefits? Does the organization also have other legal obligations (e.g. EMTALA) that relate to performing abortions or access to abortion services? Has the organization engaged in risk mitigation strategies? Does the organization have any contractual agreements (e.g., grants, payer contracts) that obligate the organization to take action?

What privacy policies and protocols does the organization have in place to protect employee medical information? Do those policies or protocols require adjustment or enhancement to protect against misuse or over-disclosure of employee information (e.g. employee use of benefits for pregnancy termination, travel or other benefits related thereto)?

Who at your organization is responsible for receiving and addressing employee questions about the organization's policies and benefits with regard to abortion and related benefits offered to employees? Has this group been trained and provided with appropriate talking points on the organization's existing or new benefits, its legal obligations and restrictions?

As key members of your organization discuss confidential legal options and risks with legal counsel, what policies does the organization have in place regarding appropriate employee communications online and with the media? Do these policies adequately address managerial employee obligations to maintain confidentiality of attorney-client privileged communications?

Has your organization developed a strategy to address anticipated Human Resources matters related to the Dobbs decision, such as employee disciplinary action or termination incidents related to employee use of abortion benefits, or employee disputes arising from religious, medical, social, and political disagreements?

RISK MITIGATION STRATEGIES TO CONSIDER

As soon as possible, work closely with knowledgeable legal counsel to evaluate the various state laws that may impact your organization and what sorts of risks are faced by the organization, members/patients, employees, contractors, Board members, officers and other stakeholders. The organization's answers to the relevant considerations noted above will inform this analysis.

Consider whether the organization's clinical and/or business priorities require the organization to limit its connections to more abortion-restrictive states and take greater advantage of certain laws and other benefits that may be available in more protective states. [Note: Monitoring which states are restrictive and protective is important, as these laws are fast-changing and there is active litigation in many states.]

Consider data storage practices and whether there are ways to further protect sensitive data, as well as internal policies, procedures, and training practices should be modified or implemented as they relate to data access and/or disclosing confidential company information.

Consider refreshed training for your teams with access to privileged information (e.g. HR, legal, risk, key management) to ensure that they understand that the legal strategies and communications discussed internally with counsel must be kept confidential.

Ensure that the individuals responsible for communicating the organization's policies and benefits to employees are trained on the policies and provided tools such as talking points to ensure messaging remains accurate and consistent.

Assess the organization's subpoena and search warrant response policies and procedures and associated personnel who may receive outreach from investigators or government enforcement authorities.

Carefully consider the content of any public-facing statements, including information found in marketing materials, benefits materials, and the organization's website. Similarly, obtain legal counsel's advice regarding preservation of attorney-client privilege over internal documents to which it may apply.

Review where workforce members are located and job descriptions and consider whether any changes should be made to operations or public-facing information. Ensure workforce members whose jobs touch family planning services are comfortable with those aspects of their roles and try to give other good options to any who are not.

Think about your organization's indemnification and defense policies regarding workforce members who could be arrested or sued for family planning-related job activities. Assess coverage available under your organization's insurance policies.

Consider whether state laws may affect distribution or marketing of prescription drugs or medical devices for use in pregnancy termination, emergency contraception or related medical procedures. Review sales and marketing strategies and update training and engagement for sales representatives and marketing personnel.

If your organization includes licensed healthcare providers who prescribe medications that are approved or indicated for use in pregnancy termination, emergency contraception or related services, evaluate the impact and scope of state laws that may prohibit or restrict prescribing practices and the related impact on current clinical guidelines or standards of care.

Think about your organization's corporate structure and whether the organization should engage in internal restructuring to reduce ties to restrictive states or take advantage of shield laws.

Work closely with knowledgeable legal counsel to determine how to structure and describe existing, continued, or additional family planning, fertility, abortion, or health care travel-related benefits and how to ensure that these benefits comply with all applicable federal and state laws.

Closely coordinate the provision of existing, continued, or additional family planning, fertility, abortion, or health care travel-related benefits with any applicable health plan administrators and/or health plan service providers to ensure that claims are administered confidentially and consistently.

If your organization wants to provide assistance to individuals affected by new state laws, consult with legal counsel regarding state and federal tax (as well as other regulatory) laws impacting cash gifts, volunteer services or donations of products (such as Plan B). Consider collaborating with an existing tax-exempt organization to provide rapid, cost-effective and potentially tax-advantaged assistance.

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